No. 78-615

In the Supreme Court of the United States

OCTOBER TERM, 1978

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is not yet officially reported. The Board's decision and order (Pet. App. 24a-94a) are reported at 214 N.L.R.B. 541 (1974).

JURISDICTION

The judgment of the court of appeals was entered on June 13, 1978. On September 1, 1978, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari until October 11, 1978, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly found that, where a successor employer's offer of employment to the predecessor's employees was coupled with an announcement of reduced wages and benefits, it was not "perfectly clear that the new employer plans to retain all of the employees in the unit" (*National Labor Relations Board* v. *Burns Security Services, Inc.*, 406 U.S. 272, 294-295 (1972)), and the successor therefore was not obligated to bargain with the predecessor's employees' representative before fixing initial employment terms.

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.* are set forth at Pet. 2-3.

STATEMENT

1. In June 1970, the National Aeronautics and Space Administration (NASA) invited bids for a contract, to commence April 1, 1971, for installation support services at the Kennedy Space Center (the Center) (Pet. App. 51a). At the time of the bid invitation, the work was being performed by Trans World Airlines (TWA), whose employees were represented under a collective agreement by the International Association of Machinists and Aerospace Workers, AFL-CIO (IAM) (Pet. App. 49a). TWA, Boeing Company, and five other companies submitted bid proposals (Pet. App. 51a-52a).

In submitting its bid, Boeing based its computation of labor costs on the wage rates and fringe benefits provided in its own collectively bargained agreement with the IAM, which covered Boeing employees performing "hardware contracts" for NASA at the Center.[1] These wages and

[1]The Boeing-IAM and the TWA-IAM agreements were administered by different locals (Pet. App. 48a-49a).

benefits were substantially below those contained in the TWA-IAM agreement then covering the installation support services employees (Pet. App. 52a).

NASA's invitation required bidders to explain their recruiting plans, including the "approximate number," by type, of incumbent employees to be hired. Boeing estimated that it would obtain 86% of its total work force from incumbent employees. Boeing stated that its staffing proposal " 'recognize[d] the desirability of retaining incumbent contractor personnel to provide continuity of functional support' " (Pet. App. 31a), but added that "[* * * [Florida State Unemployment Service] data indicated that the local labor market is sufficient in both skills and number to provide the staffing requirements of this contract" (Pet. App. 53a).

On November 23, 1970, NASA selected Boeing to negotiate a contract for support services at the Center (Pet. App. 54a). Boeing met with the IAM to discuss its bid, and stressed that the bid was based on Boeing's existing "hardware contract" at the Center. IAM officials decided that Boeing's plan to apply the existing Boeing-IAM contract to support service employees would result in a reduction in wages and benefits for incumbent employees hired by Boeing, and that the IAM would therefore not accept the plan. The IAM told Boeing and NASA that it would insist that " '* * * any successor employer must assume wages, hours, and working conditions as currently embodied in Collective Bargaining Agreements between IAM and TWA * * *' " (Pet. App. 70a-71a).

On March 11, 1971, despite vigorous protests by TWA and IAM, NASA contracted with Boeing for the installation support services (Pet. App. 55a). The following day IAM requested recognition by Boeing as the representative of the support service employees, and urged Boeing to adopt the terms of the TWA-IAM agreement. Boeing replied that it recognized IAM as the

representative of the employees but stated that it would apply the Boeing-IAM contract to the employees with no unilateral changes (Pet. App. 78).

On April 1, 1971, Boeing began performance of the support service contract with a work force of 970. It hired 380 out of the 1054 TWA incumbents, 138 of its own employees (transferees, recalls from layoff, and former employees), 450 outsiders, and two other employees (Pet. App. 30a, 49a). Boeing supplied each employee with a copy of the Boeing-IAM agreement (Pet. App. 79a). Thereafter, while maintaining their respective legal positions on the application of the TWA-IAM contract, Boeing and the IAM began negotiations to replace the Boeing-IAM agreement which was due to expire on October 1, 1971. On November 12, 1971, the parties entered into a new agreement, effective from December 13, 1971 through October 1, 1974, with a provision for automatic yearly renewal (Pet. App. 79a-80a).

2. Upon charges filed by IAM,[2] the Board's General Counsel issued a complaint alleging, *inter alia*, that Boeing had violated Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. 158(a)(5), by failing to consult with IAM on the initial terms and conditions of employment for the installation support services unit. A divided Board, however, dismissed the complaint.

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[2]In addition to filing charges with the Board, the IAM filed grievances and sought to compel Boeing to arbitrate under the IAM-TWA agreement. The issue was resolved against the Union in a lawsuit filed under Section 301 of the Labor Management Relations Act, 29 U.S.C. 185. *Boeing Co.* v. *I.A.M.*, 504 F. 2d 307 (5th Cir. 1974), cert. denied, 421 U.S. 913 (1975). The Union was also unsuccessful in its suit for damages under the Service Contract Act of 1965, 41 U.S.C. 351 *et seq. I.A.M.* v. *Hodgson*, 515 F. 2d 373 (D.C. Cir. 1975). After the events herein, the Service Contract Act was amended to provide "that no successor government contractor may pay its employees less than the wages and fringe benefits set forth in the previous contractor's collective bargaining agreement" (Pet. App. 5a n.12).

The Board rejected the contention that Boeing had a "perfectly clear" plan to retain a substantial number of incumbent employees—a plan that, under this Court's decision in *National Labor Relations Board* v. *Burns Security Services, Inc.*, 406 U.S. 272, 294-295 (1972), would have obligated Boeing to consult with IAM before setting initial employment terms. The Board found that, even if Boeing " 'intended' to hire all or substantially all of the incumbents, [Boeing's] 'intentions' were from the outset tied to the lower rates and benefits of the Boeing-IAM contract" (Pet. App. 25a-26a). Quoting from its decision in *Spruce Up Corp.* (*Spruce Up II*), 209 N.L.R.B. 194, 195 (1974) (Pet. App. 161a, 165a), the Board added (Pet. App. 26a):

> When an employer who has not yet commenced operations announces new terms prior to or simultaneously with his invitation to the previous work force to accept employment under those terms, we do not think it can fairly be said that the new employer "plans to retain all of the employees in the unit," as that phrase was intended by the Supreme Court [in *Burns, supra*]. The possibility that the old employees may not enter into an employment relationship with the new employer is a real one, as illustrated by the present facts.

3. The court of appeals affirmed the Board's order dismissing the complaint (Pet. App. 1a-23a). The court held that the Board's conclusion that "a successor employer need consult with an incumbent union with respect to initial employment terms prior to fixing them only when he has not evinced any intention substantially to modify the pre-existing terms before expressing a willingness to rehire incumbents" (Pet. App. 23a) was a "construction of the *Burns* exception [which] reasonably implements the considerations reflected in *Burns* as a

whole" (*id.* at 16a). The court also concluded that "the Board's construction of *Burns* was applied properly to the situation at bar" (*id.* at 23a).[3]

ARGUMENT

1. In *National Labor Relations Board* v. *Burns Security Services, Inc.*, 406 U.S. 272 (1972), this Court, considering the impact of employer succession on the status of a previously selected bargaining representative, held that the Board properly ordered a successor employer to bargain after that employer hired its full complement of employees, where the bargaining unit remained unchanged and a majority of the employees hired by the successor were represented by the previously certified bargaining representative. However, the Court rejected the Board's conclusion that the successor employer was bound by its predecessor's labor agreement (406 U.S. at 285-288), and the Board's position that, "whether or not a successor employer is bound by its predecessor's contract, it must not institute terms and conditions of employment different from those provided in its predecessor's contract, at least without first bargaining with the employees' representative" (*id.* at 293). Rather, the Court held that a successor employer is "ordinarily free to set initial terms on which it will hire the employees of a predecessor * * *" (*id.* at 294).

[3]The court explained (Pet. App. 23a):

> From the outset, Boeing's decision to retain TWA employees was inseparable from its decision to cling to a scale of diminished wages and benefits. Indeed, Boeing's contract bid to NASA was premised importantly on labor costs reflecting a reduction in the rate of remuneration earned under its predecessor's regime, and all concur that the terms Boeing stipulated fell appreciably short of those prevailing under TWA's auspices. Moreover, Boeing's inability to attract enough incumbents to compromise a majority of the new work force tellingly evidences the inhibitive effect of the reemployment terms. [Footnote omitted.]

To this general rule, the Court mentioned an exception (406 U.S. at 294-295):

> Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms. In other situations, however, it may not be clear until the successor employer has hired his full complement of employees that he has a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of the employees in the unit as required by §9(a) of the Act, 29 U.S.C. §159(a).

The Board in this case comported with the teaching of *Burns* in construing the exception to be inapplicable where, in the court of appeals' words, the successor employer has "evinced [an] intention substantially to modify the pre-existing terms before expressing a willingness to rehire incumbents" (Pet. App. 23a).

2. Where a successor employer couples a willingness to retain incumbent employees with an expressed intent to reduce benefits, there is a strong probability that many of the incumbents will refuse the proffered terms.[4] In these circumstances, until after it is ascertained how many incumbent employees have accepted the successor's offer, it is questionable whether the union will represent a majority of the employees in the successor unit. Since, under *Burns*, the successor's bargaining obligation does not arise until the union's majority status is clear, the Board properly

[4]Indeed, that was the case here, where only 380 of the 1054 incumbent employees accepted Boeing's offer.

concluded that, in the situation discussed, the union may not demand a say about initial terms of successor employment. This position reflects the concern of *Burns* (406 U.S. at 287-288) that a successor should be free to reorganize its predecessor's business without being locked into the predecessor's economic restraints.[5]

3. Petitioner contends (Pet. 13) that the Board's construction "virtually eviscerates the exception." But this contention ignores the fact that the exception is a narrow one: *Burns* recognizes the general right of a successor employer unilaterally to set initial terms of employment unless it is clear that the predecessor's employees will comprise a majority of the successor's work force.

On the other hand, petitioner's position that the successor's mere willingness to look to incumbent employees as the primary source of its work force suffices to create a pre-hire duty to bargain would make the exception swallow the rule. Under that position, the successor's right to set initial terms would be limited to those situations where the new employer remains silent on the incumbent employees' retention prospects or offers most of the jobs to persons outside the unit. Petitioner's reading of *Burns* would discourage employers who intended to establish new wage or benefit scales from commenting favorably on the incumbents' employment prospects and thus would discourage continuity in employment relationships. *Burns* should not be read to

[5]However, as the court below noted (Pet. App. 22a n.52):

> It should be evident that a bypass of initial-terms bargaining consistent with the Board's reading of *Burns* does not lock indefinitely the carried-over workers into conditions not to their liking. Though *Burns* affords successor employers appreciable freedom in effectuating the successorship transition, the initial adjustment of rights between the employer and incumbents is largely temporal, and if incumbents are retained they can at that point endeavor collectively to improve their lot.

compel a new employer to choose between announcing new employment conditions and seeking to hire incumbent employees.

Moreover, petitioner's position ignores the *Burns* requirement that a bargaining obligation be based on majority support of the union by the successor's work force. By omitting from consideration the fact that the incumbent employees may not accept the reduced wages and benefits upon which the new employer's willingness to employ them is conditioned, petitioner's position eliminates the threshold inquiry: whether there will be the requisite continuity in employment which is necessary before the bargaining obligation can arise. As the court of appeals stated (Pet. App. 19a), "some affiliation between employer and employee must be at least presumable as a threshold matter before an obligation to bargain arises. So long as perpetuation of the incumbent workforce remains highly speculative, that precondition is not met."[6]

[6]There is no merit to petitioner's assertion (Pet. 7-9) that the *Burns* exception is premised upon the Board's decision in *Spruce Up Corp.* (*Spruce Up I*), 194 N.L.R.B. 841 (1972) (Pet. App. 115a-160a), and *Chemrock Corp.*, 151 N.L.R.B. 1074 (1965) (Pet. App. 95a-114a). In those cases, the Board, relying in part on the teachings of *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177 (1941) and *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U.S. 111 (1944) that the term "employee" should be interpreted broadly to effectuate the Act's purposes, imposed a bargaining obligation on successor employers who had manifested an intention to hire the predecessor's employees but only on less favorable terms. Despite the alleged "parallel" language in the *Burns* exception and *Spruce Up I* (Pet. 8), the Court did not refer to *Spruce Up I* anywhere in its opinion. Similarly, the Court's citation of *Chemrock* with a "But cf." signal, elsewhere in its opinion (406 U.S. at 280 n. 5), hardly indicates that *Chemrock* was the guiding source of the *Burns* exception.

Nor did the Board, in construing the *Burns* exception more narrowly than the holdings in *Spruce Up I* and *Chemrock*, "[repudiate], *sub silentio*, the teachings of *Phelps-Dodge* and *Hearst*" (Pet. 14). *Burns* held that a successor's obligation to bargain with the

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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union representative of the predecessor's employees does not arise merely because the latter are "employees" within the meaning of the Act; rather, that obligation arises only when the successor hires, or clearly manifests an intent to hire, enough of the predecessor's employees to enable the union to remain the representative under Section 9(a) of the Act.

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